No. 41808-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DANIEL R. MAPLES,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Thomas P. Larkin, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred and acted outside its statutory authority in ordering conditions of community placement which were not authorized under the law in effect at the time of the crime in 1988.

2. Appellant Daniel Maples assigns error to the following conditions in the judgment and sentence, as indicated in bold type:

> **(7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC; and**
>
> **(8)** for sex offenders, submit to electronic monitoring if imposed by DOC. **The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. . .**

CP 129-30 (emphasis added).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Under the Sentencing Reform Act (SRA), the sentencing court in a criminal case has no inherent authority to order conditions of community placement or custody and instead is limited to ordering those conditions which are authorized by statute.

1. In 1988, when the crime occurred, the statutes authorizing the court to order conditions of community placement did not authorize granting DOC the authority to order Maples to perform affirmative acts. Did the sentencing court act outside its statutory authority in ordering such a condition which was not authorized under the law in effect for the crime?

2. The law in effect for the sentencing in this case also did not

provide the court with authority to order that an offender's residence location and living arrangements while on community placement be subject to "prior approval" of DOC unless the defendant was a "sex offender." Maples was not convicted of a sex offense. Did the sentencing court err and act outside its statutory authority in ordering such a condition when it was not statutorily authorized?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Daniel R. Maples was charged by amended information with second-degree murder and convicted after jury trial before the Honorable Thomas Larkin of the Pierce County Superior Court. CP 8, 15; RCW 9A.32.050(1)(a). On July 25, 2008, Judge Larkin ordered Maples to serve a sentence of 342 months. CP 59-71; 1RP 1-33.[1] Maples appealed and, on September 21, 2010, this Court affirmed his conviction but remanded for a hearing to determine whether he had spent ten consecutive years in the community without being convicted of any felonies, after he was released from custody on a 1977 robbery conviction. See CP 73-95. The Mandate issued on October 26, 2010, and the case was remanded for that hearing. See CP 73-74.

After a continuance on January 28, 2011, on February 2, 2011, Judge Larkin resentenced Maples to a standard-range sentence of 240

[1]The verbatim report of proceedings for this appeal case consists of two volumes, which will be referred to as follows

the volume containing the proceedings of July 25, 2008, as "1RP,"

the volume containing the separately paginated proceedings of January 28, 2011, and February 2, 2011, with each proceeding separately noted as "2RP" and "3RP," respectively

months, based upon a corrected standard range. CP 121-133; 3RP 1-15. Maples appealed and this pleading follows. See CP 137-50.

2. Facts relevant to issues on appeal

At the initial sentencing, there was extensive argument about how to classify Maples' prior conviction in 1977 for a pre-SRA robbery and whether that conviction should count or "washout" in the offender score. 1RP 8-12. The parties agreed that 1988 law "is what applies at the sentencing" but disputed how to classify that 1977 conviction and which "washout" provision should apply as a result. 1RP 12. The sentencing court held that the robbery conviction did not "wash out" and sentenced Maples accordingly, imposing a sentence at the top of the standard range of 257-342 months 1RP 18-19,

On appeal, Maples argued, *inter alia*, that the sentencing court erred in county the 1977 robbery in the offender score. See CP 90-91. This Court held that the robbery was "comparable to the current crime of second degree robbery," not first-degree robbery as the sentencing court had found, so that a 10 year "washout" period for Class B felonies applied. CP 90-91. Although the prosecution conceded on appeal that, as a result, the 1977 conviction should have "washed out" and not counted in the offender score, this Court did not accept that concession. Id. Instead, the Court remanded for a hearing for the sentencing court to determine whether Maples had spent ten consecutive years in the community without being convicted of any felonies during the relevant time and thus whether the 1977 conviction should have "washed out." Id.

After a continuance, at the hearing on remand, the court found that

the 1977 conviction washed out and the resulting offender score was thus two points lower than had been used at the original sentencing. 2RP 2-5; 3RP 7-8. Counsel then argued that, under the law in effect at the time of the crime in 1988, Maples should not be required to provide DOC with a particular address to which he would be released before he could be allowed to serve "his earned early release, his good time" in the community. 3RP 11. Counsel informed the court that DOC had indicated that they would keep Maples in custody if he did not have such an address at the time of the possible release. 3RP 11. She argued that the law in effect in 1988 at the time of the crime did not allow such a condition of community placement and argued that the sentencing court thus did not have the authority to order it. 3RP 11. She also, somewhat confusingly, said that in 1988 DOC did not have "the requirement that an individual have a particular address be released to at the time of the release." 3RP 11.

In ruling on the issue, the court stated that it thought the requirement about the address was "a rule that the Department of Corrections has[.]" 3RP 14. The court did not know "what the release conditions in the future" will be with DOC but declared, "I'm not going to change the terms and conditions." 3RP 14. The court said, "[i]f they have that rule in place, I believe, based on his criminal history, he should have an address to report to." 3RP 14. The court then stated, "I'm going to deny that request to make that change." 3RP 14. The court then checked a box on the judgment and sentence ordering "community placement" for 12 months and indicating the following community placement conditions, in

relevant part:

> While on community placement or community custody, the defendant shall (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions, (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC; and (8) for sex offenders, submit to electronic monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody . . .

CP 129-30.

D. ARGUMENT

THE SENTENCING COURT ERRED IN IMPOSING CONDITIONS WHICH WERE NOT STATUTORILY AUTHORIZED UNDER THE LAW IN EFFECT FOR MAPLES' CASE

With the passage of the Sentencing Reform Act (SRA), the unfettered discretion sentencing courts had in fashioning conditions of community placement or similar options has been limited. See, e.g., State v. Barclay, 51 Wn. App. 404, 406, 753 P.2d 1015 (1988). The SRA represented a "fundamental shift" in the sentencing philosophy used in our state, applying a standard range system and limiting the sentencing court's discretion so that it is constrained by the statutes. See id. As a result, a sentencing court is limited to imposing only those conditions of community placement which are authorized by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009).

In this case, the sentencing court acted outside its statutory

authority in imposing several of the conditions of community placement, because they were not statutorily authorized.

To answer the question of whether a sentencing court acted outside its statutory authority in ordering a particular condition of community placement, the Court must examine the law in effect at the time of the crime. See In re Capello, 106 Wn. App. 576, 24 P.3d 1074, review denied, 145 Wn.2d 1006 (2001). This Court reviews the issue de novo. See State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Here, the crime occurred in October of 1988. See CP 8. Under former RCW 9.94A.120(8)(b)(2008), for serious violent offenses like second-degree murder, committed "on or after July 1, 1988," there were several mandatory conditions of community placement which were to be imposed in each case unless the court decided to waive them. See former RCW 9.94A.120(8)(b)(2008). Those waivable conditions were as follows:

> (i) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
>
> (ii) The offender shall work at department of corrections-approved education, employment, and/or community service;
>
> (iii) The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;
>
> (iv) An offender in community custody shall not unlawfully possess controlled substances; and
>
> (v) The offender shall pay community placement fees as determined by the department of corrections.

Former RCW 9.94A.120(8)(b)(2008). The statute also gave the sentencing court the authority to exercise its discretion regarding several

further conditions which the court was permitted - but not required - to order, providing, as follows:

> The court may also order any of the following special conditions:
>
> (i) The offender shall remain within, or outside of, a specified geographical boundary;
>
> (ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
>
> (iii) The offender shall participate in crime-related treatment or counseling services;
>
> (iv) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or
>
> (vi) The offender shall comply with any crime-related prohibitions.

Former RCW 9.94A.120(8)(b) (2008); see Laws 1988, ch. 153, § 2 (enacting the provisions effective July 1, 1988).

These statutory sections authorize many of the conditions imposed by the sentencing court in this case, such as condition (5) not to unlawfully possess controlled substances or (6) which required him to pay supervision fees. But they did not authorize condition (3) and the "prior approval" portion of (8). Taking the last condition first, there was no authority for the sentencing court to order that DOC have prior approval of the "residence location and living arrangements" for community placement in this case. Former RCW 9.94A.120(8)(b)(v)(2008) only gave the sentencing court the authority to order such "prior approval" if the defendant was "a sex offender." Maples was not convicted of a sex offense; he was convicted of second-degree murder. See CP 8, 15. Thus, there was no authority for this condition to be imposed.

Indeed, this condition remained an optional - not mandatory - condition even in sex offense cases until 1992, 4 years after the crime in this case. It was only in 1992 that the Legislature added a provision to RCW 9.94A.120 making such preapproval a "standard" condition in certain sex cases, which may nevertheless still be waived by the trial court. See Cappello, 106 Wn. App. at 582. And it was only effective March 14, 2002, that the Legislature enacted statutory language allowing DOC to require that people transferred to the community in lieu of earned release must provide an approved residence and living arrangement. See Personal Restraint of Stewart, 115 Wn. App. 319, 329-30, 75 P.3d 521 (2003). Notably, those 2002 amendments allowing such a requirement have been held not to apply retroactively to cases such as this, because "such retroactive application contravenes" the appellate court's "construction of the original statute, which must be followed." 115 Wn. App. at 340.

Because the 1988 statutory scheme did not authorize the condition in condition 8 requiring Maples to get preapproval of his living situation and arrangements, it must be stricken. And this is so despite the lack of clarity in the judgment and sentence about the court's order. The judgment and sentence is mostly a form document with boilerplate provisions but portions of the court's order appear to have been specifically added, such as the condition that Maples have no contact with specific people. See CP 121-33. The "preapproval" condition is contained in the same subsection as other conditions discussing conditions for sex offenses. See CP 129. As counsel noted below, however, DOC has indicated its intent to treat that requirement as separate and to refuse to

release Maples even if he has earned that release if he does not get the "prior approval" set forth in this condition. See 3RP 11. If the Court examines the confusing structure of the judgment and sentence and decides that, in fact, the "preapproval" requirement does not apply to Mr. Maples, it should make that holding clear so that DOC is aware that it is not allowed to enforce the provision even if DOC deemed that it applied, because that condition was not statutorily authorized and should not have been ordered by the sentencing court.

Nor was there anything in former RCW 9.94A.120(8)(b)(2008) which authorized the sentencing court to order condition 7, requiring Maples to "perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC." Indeed, the statutory scheme did not specifically authorize ordering such "affirmative acts" until 1997, when the Legislature rewrote the statute in order to allow such authority for the first time. See Laws of 1997, ch. 144, § 1; but see State v. Riles, 135 Wn.2d 326, 342, 957 P.2d 655 (1998).

Because the relevant parts of conditions 7 and 8 were not statutorily authorized, applying de novo review, this Court should strike those conditions and reverse and remand for sentencing in accordance with that ruling.

E. CONCLUSION

For the reasons stated herein, this Court should strike the unauthorized conditions of community placement.

DATED this 7th day of September, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Mr. Daniel Maples, DOC 251234, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 99362; and to Kathleen Proctor, c/o Pierce County prosecutor's office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402.

DATED this 7th day of September, 2011.

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